IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 635 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HAPUJI UMAJI GELOT

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 635 of 2003

MS PAHWA FOR M/S THAKKAR ASSOC. for Petitioner No. 1

MS NANDINI JOSHI, AGP for Respondent No. 1-3

RULE SERVED BY DS for Respondent No. 1-2

MS PJ DAVAWALA for Respondent No. 4

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 30/04/2003

ORAL JUDGEMENT

Heard the learned counsel Mr. Pahwa for Ms. Pahwa appearing for the petitioner and learned AGP Ms. Nandini Joshi for the respondent Nos. 1 to 3.

2. By invoking jurisdiction under Article 226 of the Constitution, petitioner has challenged legality and validity of the order of detention dated 29th August 2002 passed by the District Magistrate, Banaskantha at Palanpur in exercise of powers vested under Section 3(2) of Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980 (hereinafter referred to as the 'PBM Act').

3. During the course of oral submissions, further affidavits on behalf of respondent No.1 State of Gujarat and the District Magistrate Respondent No.2 have been tendered by the learned AGP Ms. Nandini Joshi. The same are taken on record. In the same way affidavit tendered by the learned standing counsel for Union of India Ms. P.J.Davavala is also taken on record. I have carefully considered the contentions raised by the petitioner and the reply given by the State in response to the allegations made in the petition.

4. The learned counsel for the the petitioner Mr. Pahwa has taken me through the memo of petition and has submitted that the order of detention is bad on many counts and, therefore, the same requires to be quashed. However, during the course of oral submissions he has concentrated her argument mainly on two points. The first point advanced by Mr. Pahwa is that similarly situated detenu whose petrol pumps were raided by the State Government and responsible officers of Civil Supply Departments have been set at liberty either on recommendation of the Advisory Board or under the orders passed by this Court. There is no element of black marketing and the present petitioner has been unnecessarily detained. So, on the ground of parity, the petitioner should also be set at liberty forthwith. The second point argued by Mr. Pahwa is that till date, the petitioner has not been prosecuted by the State machinery. The point of alternative remedies could have been considered and instead of taking harsh action of passing a detention order, the authority could have initiated other proceedings and, therefore, on this ground also it should be held that the order is bad.

5. In response to this submission, learned AGP Ms. Nandini Joshi has submitted that the case of the present petitioner is on a different footing and, therefore, the argument of parity could not help the present petitioner and according to her, ratio of the decision of the Court reported in 1992 (2) GLH 144 is against the present petitioner. The full Bench of this court in said

decision has considered the question; whether non-consideration of the less drastic measure, such as externment, by the detaining authority before passing any order of detention against the detenu can be said to be a matter of non-application of mind vitiating the subjective satisfaction and ultimately invalidating the order of detention, and the full Bench has answered this point in negative. She has further submitted that in the present case, before passing the order of detention, the authority has already considered this aspect and has recorded its finding that the detention order is required to be passed instead of taking any other less drastic measure in view of the nature of allegations and the papers submitted for consideration to the authority. It is clearly observed that less drastic remedies are not found effective in curbing the black marketing of the essential supplies either petrol, kerosene etc. The say of Ms. Nandini Joshi is that immediate curbing of such activities was required and the detaining authority while passing the order has considered all relevant aspect including the test report of Forensic Science Laboratory (FSL for short). According to Ms. Nandini Joshi, the sample sent for analysis was not found as per required standard.

6. There is some force in the submission of Mr. Pahwa that the petitioner requires to be granted benefit under the principle of parity. It is not a matter of dispute that total 11 petrol pumps were raided on same day by different teams in the Banaskantha District and five samples drawn from the respective petrol pumps were found 'not as per the standard' during the FSL test. Two of them have been set at liberty on recommendation of the Advisory Board. Today, a copy of the decision of this Court in Special Civil Application No. 293 of 2003 is tendered for perusal and this question was raised by this Court specifically to the learned AGP appearing in the matter on behalf of the State of Gujarat. It is on record that learned AGP had responded to the query of the Court and had submitted that the report of the Advisory board is a confidential document and it would not be possible for the AGP to disclose the detailed reasons. However, the Court was informed that these two detenu were not supplied correct copy of one document, i.e., IS 1460-2000 and a wrong copy was supplied to them. As the incorrect copy was supplied to these two detenu, this Court can reasonably infer that the Advisory Board might have opined in favour of the detenu. The other two detenu have been set at liberty by this court and their petitions have been allowed. Learned advocate Mr. Pahwa has placed reliance therefore, on one of the decision

given by this Court in Special Civil Application No. 293 of 2003.

7. According to Ms. Joshi, the decision of the full Bench cited today before this Court was neither cited nor placed before the learned single Judge when the above said Special Civil application was taken up for hearing. So, the decision of learned single Judge should be treated per incurium and cannot be taken into consideration with a view to give benefit of parity to the present petitioner.

8. Undisputedly, the licence of present petitioner was suspended for 90 days and the entire stock was seized by the authority. It is submitted by Mr. Pahwa that the licence of present petitioner has not been renewed and the petrol pump at present is closed. I am told that the petitioner has not been arrested or prosecuted for any criminal offence punishable under provisions of Essential Commodities Act or any other provision of law. Obviously, therefore, he has not been arrested for any criminal wrong. Institution of criminal proceeding and arrest which normally could have followed after lodging of the FIR, could not have been proved effective with a view to curbing the activity of black marketing is neither found valid nor good reason. If this logic is accepted, as well founded reason, then in each criminal case, the accused would face detention. The order of detention is a harsh action because a free citizen is thrown to incarceration without any opportunity and immediate curtailment of the movement, when the order is executed. Therefore, only the Courts of this Country have responded with all sensitivity when the orders of detention are placed before the Court for judicial review or scrutiny. It is true that it has been observed by a Division Bench of this Court in case of PARSHOTTAMBHAI NAVALRAM KHEMANI V. STATE OF GUJARAT AND ANOTHER, 1985(2) GLR 620 that; cancellation of licence and prosecution in a court are alternative remedies but such remedies are no bar to preventive detention.

9. I have carefully gone through the decision in the case of Parshottambhai (supra) but the fact remains that the detaining authority is supposed to consider this vital question as to whether the cancellation of licence of the petitioner would be sufficient, on the facts of each case, to remove him from way. Secondly, whether the criminal prosecution would be sufficient in a given case. In the cited decision, the Court has commented on the method under which the Court can put to satisfaction. In the cited decision, the licence was surrendered, the

order under challenge before this Court is mainly passed on the finding recorded by the FSL and the authority has mainly hammered on the aspect that the diesel is an essential commodity and the quality of this essential commodity requires to be maintained as per standard prescribed. But, while recording subjective satisfaction, the authority has not considered the other remedies/steps which could have been taken by the authority in light of the above cited decision of the full Bench reported in 1992 (2) GLH 144. It is true that the authority has considered whether the logic of prosecution under Section 3 read with Section 7 of Essential Commodities Act could be effective. However, it is not under consideration whether suspension or cancellation of a licence would be sufficient and what would be effect if the entire stock is taken away and he is pushed out of the market and his right to trade in the very commodity. The grounds for detention served to the detenu are silent on this aspect. In paragraph 22 of the decision in case of PARSHOTTAMBHAI NAVALRAM KHEMANI (supra), the Court has observed that once the detaining authority states that it was aware that the detenu was being prosecuted under ordinary law but it was satisfied that prosecution under ordinary law was not sufficient to prevent the detenu from indulging in similar activities in future, the said statement would satisfy the legal requirement, but in the present case, the detaining authority has mentioned that even institution of proceedings and his arrest also would not be sufficient. It is settled that recording of subjective satisfaction is a privilege to the executive authority but such subjective satisfaction must have been recorded with utmost objective approach. It seems that the detaining authority was keen to pass the order of detention without taking other steps and other alternative remedies. The Court is not supposed to evaluate the validity of the subjective satisfaction recorded by the detaining authority as if this Court is sitting in appeal. If liberty of a person is to be put to stake then the element of reasonableness in the entire proceeding shall have to be considered. Act of raiding 11 places in the same district at a time and passing of detention order against 5 petrol pump owners whose samples were not confirmed by the FSL indicates about the straight drive on the subject. The averments made in the present petition also clearly indicate the element of discrimination by the same authority amongst these five persons against whom detention orders have been passed by different detaining authorities. I am in agreement with Mr. Pahwa that the ratio of the decision of the learned single Judge in Special Civil Application 293 of 2003

helps the present petitioner and even if the order of detention is put on the touch stone of the decision cited by learned AGP, Mr. Nandini Joshi in case of PARSHOTTAMBHAI NAVALRAM KHEMANI (supra), would help the petitioner. In the same way, the decision reported in AIR 2000 SC 3675 AMRUTLAL AND OTHERS VS. UNION GOVERNMENT AND OTHERS also would help the present petitioner, therefore, petition requires to be allowed.

10. In the result, this petition is allowed. the impugned order of detention dated 29th August, 2002 passed by the District Magistrate, Banaskantha at Palanpur is hereby quashed and set aside. The petitioner detenu HAPUJI UMAJI GELOT is set at liberty forthwith, if he is not required to be detained in any other case. Rule is made absolute. DS permitted.

(C.K.Buch,J)

Jayanti*